IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1478

STANLEY JAFFEE and SHARON BLINN JAFFEE, Individually,

and

STANLEY JAFFEE, on behalf of all others similarly situated,

Petitioners,

against

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

STANLEY J. LEVY
STEVEN J. PHILLIPS
Counsel for Petitioners
99 Park Avenue
New York, N. Y. 10016

KREINDLER & KREINDLER
New York, N. Y.

ANDREW R. JACOBS
LANIGAN, O'CONNELL & HIRSH
Basking Ridge, N. J.
Of Counsel

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UNITED STATES OF AMERICA,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Petitioners Stanley Jaffee and Sharon Blinn Jaffee pray for a *writ of certiorari* to review that part of a judgment of the United States Court of Appeals for the Third Circuit entered in these proceedings on February 9, 1979, which affirmed the dismissal of petitioner's claim for medical examination, and, if necessary medical care for all servicemen exposed to nuclear radiation as a result of having been compelled to attend nuclear bomb testing conducted by the Government.

Opinions Below.

The opinion of the Court of Appeals appears at pages 21-36 of the attached appendix and is reported at F. 2d . The order of the District Court for the District of New Jersey, Hon. Herbert J. Stern, U.S.D.J., from which appeal was taken to the Circuit Court appears at pages 19-20 of the attached appendix and is not officially reported.

Jurisdiction.

The judgment of the Court of Appeals was entered on February 9, 1979. The jursdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented.

1. Are the federal courts powerless to compel the United States Government to provide potentially life-saving medical attention to individuals who were seriously and permanently injured when the United States Government deliberately violated their fundamental constitutional rights?

2. Should an exception be created from the common-law doctrine of sovereign immunity to insure the vindication of constitutional guarantees?

3. Should the doctrine of sovereign immunity be abolished?

Constitutional Provisions Involved.

U. S. Const. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Const. Amend. IV:

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation and particularly describing the place to be searched, and the persons or things to be seized.

U. S. Const. Amend. V:

No person shall be held to answer for a capital or otherwise infamous crime, unless upon presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life and limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Const. Amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U. S. Const. Amend. IX:

The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.

Statutes Involved.

5 U. S. C. §702 reads as follows:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, that any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

5 U. S. C. §703 reads as follows:

> The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

28 U. S. C. §1331(a) reads as follows:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States, except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

Statement of the Case.

Introduction.

The claim that is the subject of this petition was brought on a class basis, on behalf of thousands of former servicemen who were injured when they were compelled, in direct and flagrant violation of their constitutional

rights, to attend and participate in the explosion of a nuclear bomb at Camp Desert Rock, Nevada in the Spring or Summer of 1953.

The relief sought is equitable in nature. Specifically, the District Court was asked to issue an injunction directing the Government: 1) to warn these former servicemen that they stand in great danger of developing cancer, leukemia and other radiation induced illnesses, and to advise them to seek prompt diagnostic medical attention; and 2) to provide diagnostic examinations, and where necessary therapeutic care, or, at the Government's option, to subsidize such care.

In short, the purpose of this claim is to compel the Government to take steps to try to save the lives and safeguard the health of those very people whose lives have been placed in jeopardy by the Government's constitutional violations.

Petitioner's factual contentions.

At some time during the spring or summer of 1953, a substantial number of American servicemen were ordered by their military superiors to attend and participate in the test explosion of a nuclear device at Camp Desert Rock in Nevada (2a, ¶¶ 6, 7).* These servicemen were subject to military discipline, and the Army has conceded that they were compelled to attend the atomic blast and were not volunteers (32a). They were never advised that participation in the test involved any possible health danger to them nor were they given any opportunity to decline or refuse to participate (14a).

*Parenthetical references are to the Appendix for petitioner's appeal to the Third Circuit, a copy of which has been certified and transmitted to this Court by the Clerk of the United States Court of Appeals for the Third Circuit.

At the test site itself, the soldiers were exposed to massive doses of dangerous radiation when the atomic bomb was exploded only two or three thousand yards away from where they were ordered to stand (14a). They were provided with no protective devices or clothing to shield them from the bomb's harmful radiation. Thereafter they were exposed to additional radiation when they were immediately ordered to leave their trenches and march toward the very site of the atomic explosion itself (15a).

At the time of this test the United States Government was well aware of the great dangers inherent in exposing human beings to the radiation from a nuclear explosion (3a, ¶11). However, the Government consciously ignored this knowledge, and instead, deliberately used these servicemen as unwilling and uninformed human subjects of highly dangerous experiments (3a, ¶12).

As a consequence of this test, many of the exposed servicemen have begun to develop certain radiation induced cancers in unsually high numbers (7a, ¶¶ 29, 30). It is probable that a substantial number of new cases will manifest themselves in the near future. Some of these diseases are of a kind that can be arrested or cured if detected at an early state of their development. However, the prospects for successful treatment decrease markedly when diagnosis and therapy is delayed (7a, ¶30).*

*It should also be noted, that as a consequence of the District Court's disposition on the motion to dismiss the class claim, plaintiffs' motion pursuant to Rule 23(c) of the Federal Rules of Civil Procedure, to certify the proposed class, while fully briefed was neither argued nor decided, and is, of course, not now before this Court.

The United States Government has never taken any steps to warn or advise these servicemen of the dangers to which they were exposed by being forced to participate in this nuclear testing (8a, ¶31). Accordingly, a substantial number of the exposed individuals are totally unaware of their need for medical care. Consequently they have not sought appropriate medical attention. It is probable that many of these servicemen will suffer serious and even fatal injury which can be avoided if such warnings are issued and prompt medical attention obtained (8a, ¶32).

Stanley Jaffee, the individual plaintiff and class representative herein, was one of the United States Army enlisted men who was compelled to attend the blast (2a, ¶7, 14a). He is forty-seven years old, married with three minor children, and has lived and worked his entire life in the State of New Jersey. He was drafted in 1952, served a two year tour of active duty, and was honorably discharged from service (14a).

In November 1977, Jaffee discovered that he had developed breast cancer as a result of his exposure to the nuclear radiation from the explosion (16a). Although a radical mastectomy was performed, subsequent medical tests have revealed that his cancer has spread and is inoperable (16a). He is presently undergoing a course of chemotherapy (16a).

Proceedings Below.

The Government moved pursuant to Rule 12(b) of the Federal Rules of Civil Procedure to dismiss this class action claim, as well as the individual personal injury claims for money damages brought by Mr. and Mrs. Jaffee.

The Honorable Herbert J. Stern, U.S.D.J. granted this motion to the extent only of dismissing the class action claim, reserving decision on the three individual claims against the Government* (see pp. 19-20, *infra*).

The District Court then certified an appeal pursuant to Rule 54(b) Federal Rules of Civil Procedure. The Circuit Court, accepting jurisdiction pursuant to 28 U. S. C. 1292(a)(1), reversed the order of the District Court only with respect to that part of petitioners' claim seeking notice and warning. It affirmed the dismissal of petitioners' claim for medical care (see pp. 21-36, *infra*).**

Original Basis of Federal Jurisdiction.

Federal jurisdiction over the instant claim exists pursuant to 28 U. S. C. §1331(a) in that this claim against the United States arises under the First, Fourth, Fifth, Eighth and Ninth Amendments to the Constitution of the United States.

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*Although the Government has not answered in this action, and has certainly not admitted that its conduct is responsible for causing these injuries, in a highly revealing colloquy before the District Court, counsel for the Government did admit that they were in no position to deny these allegations, and that they are, in fact, now being studied by a special interagency task force (30a).

**On March 7, 1979 the District Court, on the authority of the Court of Appeals opinion dismissed the three personal injury claims of the Jaffees against the United States. In addition, the claims against the now named and served individual defendants were dismissed. An immediate appeal of the latter dismissals was certified pursuant to Rule 54(b) F.R.C.P.

Reasons for Granting the Writ.

I.

The extraordinary circumstances of this case, and particularly the fact that the health and lives of vast numbers of former American servicemen are at jeopardy, makes it of paramont public importance that this Court promptly determine whether the Federal Courts have the power to compel the United States Government to provide appropriate medical attention to individuals it seriously and permanently injured when it deliberately violated their fundamental constitutional rights.

The extreme importance and urgency of this case was recognized by both the circuit and the district courts. In certifying the appeal pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, the District Court concluded,

> that it is of unusual importance that there be prompt appellate review of this issue since, if plaintiffs' allegations are true, the health and even the lives of a substantial number of former American servicemen may be jeopardized by any delay in affording the relief requested (see p. 20, *infra*).

In a similar and even more forceful vein, the Court of Appeals stated that,

> Under the extraordinary facts of this case, in which it is alleged that many soldiers have been exposed to nuclear radiation, each day of delay can reasonably be assumed to bring irreversible and perhaps fatal consequences to them. To postpone judicial review until Jaffee now formally notifies the Army would serve little purpose. We can take judicial notice that the dangers of radiation from nuclear detonation are a matter of public knowledge (see p. 36, *infra*).

With so many thousands of lives potentially at risk, it is imperative that this Court review the Circuit Court's determination that it lacked the power to compel the Government to provide medical care to these servicemen.

It is respectfully submitted that the Circuit Court's conclusion that it lacked authority to permit this medical attention is in conflict with this Court's decision in *Bell v. Hood,* 327 U. S. 678 (1945), where it was held that violations of constitutionally protected personal rights give rise to causes of action for equitable relief, money damages, or indeed, for "any available remedy to make good the wrong done." 327 U. S. at 684. See also *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U. S. 388, 398 (1971) (Harlan, J., concurring).

The notice and warnings to these servicemen, now required by the Court of Appeals' holding, while important, do not by themselves constitute a complete or an adequate equitable remedy. This is true because many of the radiation induced diseases about which warnings must be issued have long latency periods. They are often not detectable in their early stages (when treatment is most likely to yield results) without sophisticated diagnostic equipment and specially trained personnel. It is probable that a substantial number of these former servicemen will not have the means or the ability to locate or obtain such sophisticated help unless Government medical facilities are made available. In addition, without Government medical involvement it is virtually certain that many of these servicemen, even if forewarned, will be unable to obtain prompt experienced diagnosis and proper treatment. Accordingly, it is petitioners' position that the equitable relief afforded by the Court of Appeals under the aegis

of the 1976 Amendments to the Judicial Review Chapter of the Administrative Procedure Act, Pub. L. No. 94-574, 90 Stat. 2721 (1976) was incomplete. The potential consequences of this failure to provide a complete and adequate remedy are frightening to contemplate.

This Court has long held that a court of equity should do complete justice, *Terrell v. Allison,* 88 U. S. (21 Wall.) 289 (1874), and recently stated in *Swann v. Charlotte-Mecklenburg Bd. of Ed.,* 402 U. S. 1 (1971) that,

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breath and flexibility are inherent in equitable remedies. 402 U. S. at 15.

It is respectfully submitted that the lower courts' limitation of petitioner's remedies is violative of these equitable principles. This is particularly true in light of this Court's statement in *Swann, supra,* that it is "the nature of the violation [which] determines the scope of the remedy." 402 U. S. at 16.

The enormity of the wrong alleged herein is beyond dispute. The urgency and importance of the relief withheld by the Court of Appeals decision cannot be denied. Unless this Court reviews and reverses the decision of the Court of Appeals limiting the relief available to these veterans, they will be left without an adequate remedy and faced with irreparable harm.

II.

This Court should resolve whether the common law doctrine of sovereign immunity prevents the vindication of constitutional guarantees.

It has been the Government's position, baldly stated throughout this litigation that, notwithstanding the egregious nature of its conduct, and notwithstanding the terrible nature of the injuries it inflicted on these former servicemen, the courts lack the power to grant any relief whatsoever. The basis of this extraordinary assertion of freedom from responsibility has been the Government's reliance upon the common law doctrine of sovereign immunity.

In sharp contrast, it has been petitioner's strenuously argued position, paraphrased by the Court of Appeals,

> that sovereign immunity is no more than a common law doctrine created by courts, and as such courts have the power to abolish or modify it. Petitioner also asserts that in spite of its longevity, the doctrine is illogical, unjust, outdated and that it should be stricken in its entirety when it impedes the vindication of what he characterizes as fundamental constitutional rights (see p. 26, *infra*).

The Court of Appeals apparently concluded that only this Court has the power to abolish or carve an exception to the doctrine of sovereign immunity. (See p. 30, *infra*).

However, this Court has never addressed itself squarely to the question of whether sovereign immunity will bar relief in the face of deliberate governmental violations of constitutional guarantees. Neither *Testan v. United*

States, 424 U. S. 392 (1976), nor *United States v. Sherwood,* 312 U. S. 584 (1941), the cases principally relied upon by the Court of Appeals concerned deliberate violations of fundamental rights, let alone anything approaching the magnitude of the wrongful conduct alleged herein. This Court has consistently and unequivocally espoused from the earliest days of our Republic the proposition that the Constitution, and especially those personal rights protected by the Bill of Rights constitute a supreme law whose dictates must be vindicated. *Marbury v. Madison,* 5 U. S. (1 Cranch) 137 (1803); *Ex Parte Milligan,* 71 U. S. (4 Wall.) 2 (1866); *United States v. Lee,* 106 U. S. 196 (1882); *Bell v. Hood, supra; Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics, supra; Butz v. Economou,* ..... U. S. ....., 57 L. Ed. 2d 895 (1978).

In recent days this Court has struck down the common law doctrines of absolute official immunity for high state and local officials in *Scheuer v. Rhodes,* 416 U. S. 232 (1974), and did the same for high federal officials in *Butz, supra.* In each instance these doctrines were eliminated to assure the vindication of constitutional guarantees. It is respectfully submitted that the time has come for this Court to consider and resolve whether the same result should be obtained in the case of sovereign immunity.

III.

This Court should determine whether sovereign immunity should be abolished outright.

The Court of Appeals recognized that "the current climate of academic and judicial thought finds governmental immunity from suit in disfavor" (see p. 29, *infra*).

A heavy majority of state supreme courts have rejected sovereign immunity as an antiquated and pernicious doctrine that cannot be justified in a modern society, see e. g., Alaska, *City of Fairbanks v. Schaible,* 375 P. 2d 201 (1974); Arizona, *Stone v. Arizona Highway Commission,* 93 Ariz. 384, 381 P. 2d 107 (1963); California, *Muskopf v. Corning Hosp. District,* 55 Cal. 2d 211, 359 P. 2d 457 (1961); Florida, *Hargrove v. Town of Cocoa Beach,* 96 So. 2d 130 (1957); Idaho, *Smith v. State,* 93 Idaho 795, 473 P. 2d 937 (1970); Illinois, *Molitor v. Kareland Community Dist. No. 302,* 18 Ill. 2d 11, 163 N. E. 2d 89 (1959); Kansas, *Carroll v. Kittle,* 203 Kan. 841, 457 P. 2d 21 (1969); Kentucky, *Haney v. City of Lexington,* 386 S. W. 2d 783 (1964); Louisiana, *Board of Commissioners of The Port of New Orleans v. Splendour Shipping & Enterprises Co. Inc.,* 273 So. 2d 19 (1973); Missouri, *Jones v. State Highway Comm.,* 557 S. W. 2d 225 (1977); Massachusetts, *Whitney v. City of Worcester,* 366 N. E. 2d 1210 (1977); Michigan, *Williams v. City of Detroit,* 364 Mich. 231, 11 N. W. 2d 1 (1961); Minnesota, *Spanel v. Mounds View School Dist. No. 621,* 118 N. W. 2d 795 (1962); Nebraska, *Brown v. City of Omaha,* 183 Neb. 430, 160 N. W. 2d 805 (1968); Nevada, *Rice v. Clark Co.,* 79 Nev. 253, 382 P. 2d 605 (1963); New Jersey, *Willis v. Department of Conservation and Economic Development,* 55 N. J. 534, 264 A. 2d 34 (1970); Washington, *Kelso v. City of Tacoma,* 63 Wash. 2d 913, 390 P. 2d 2 (1964); Wisconsin, *Holytz v. City of Milwaukee,* 17 Wisc. 2d 26, 115 N. W. 2d 618 (1962); and Wyoming, *Oroz v. Board of County Commissioners of Carbon Co.,* 575 P. 2d 1155 (1978). Similarly, academic opinion has long been hostile to this doctrine. See e. g., Borchard, *Government Responsibility In Tort,* 36 YALE L. J. 1 (1926); Jaffe, *Suits Against Governments And Officers: Sovereign Immunity,* 77 HARV. L. R. 1 (1963).

In addition, it may be added that both the executive and the legislative branches of the Federal Government have expressed a substantial hostility toward the doctrine of sovereign immunity. Thus, the House Judiciary Committee Report, H. R. Rep. No. 1656, 94th Cong., 2nd Sess., *reprinted in* (1976) U. S. CODE CONG. AD. NEWS 6121, recommending the enactment of what became the 1976 Amendments to the Judicial Review Chapter of the Administrative Procedure Act, favorably cited the following language of Assistant Attorney General Antonin Scalia,

> No one can read the significant Supreme Court cases on sovereign immunity, from *United States v. Lee,* 106 U. S. 196 (1882) to *Malone v. Bowdoin,* 396 U. S. 643 (1962), *Dugan v. Rank,* 372 U. S. 609 (1963) and *Hawaii v. Gordon,* 373 U. S. 57 (1963) (*per curiam*), without concluding that the field is a mass of confusion; and if he ventures beyond that to attempt some reconciliation of the court of appeals decisions, he will find confusion compounded. Accepting the elimination of the doctrine of sovereign immunity is not, then, a case of exchanging the certain for the uncertain, of the known for the unknown. *Id.,* at 6.

While Congress, in enacting these amendments clearly sought to eliminate or minimize some of the confusion that adheres to the doctrine of sovereign immunity, the Court of Appeals decision herein, arbitrarily limiting the type of remedies available to these former servicemen is clear evidence that this confusion still remains.

While petitioners recognize that this Court has just recently addressed the issue of sovereign immunity in a state context in *Nevada v. Hall,* ..... U. S. ..... (No. 77-1337, March 5, 1979); *Lake County Estates Inc. v. Tahoe Regional Planning Agency,* ..... U. S. ..... (No. 77-1327, March 5, 1979); *Quern v. Jordan,* ..... U. S. .....

(No. 77-841, March 5, 1979), it is respectfully submitted that both the role, and the rationale of sovereign immunity in our federal jurisprudence is as yet largely unsettled.

In *Nevada v. Hall, supra,* this Court repeated Justice Holmes' formulation in *Kawananakoa v. Polybank,* 205 U. S. 349 (1907), that sovereign immunity is based "on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends." 209 U. S. at 353. This formulation has been roundly criticized virtually since its enunciation, and indeed, even its internal logic has long been subject to attack. See, e. g., Borchard, *Governmental Responsibility in Tort, V,* 36 YALE L. J. 757 *et seq.* (1927); Laski, *Responsibility of the State in England,* 32 HARV. L. R. 447, 464, *et seq.* (1919). It is respectfully submitted that this Court should reconsider whether either logic or practice require the continued existence of sovereign immunity, particularly in a world where experience teaches that the federal government is quite capable of actively defending or participating in lawsuits on virtually every subject known to man, without being hindered in its ability to govern effectively.

It is petitioners' position that sovereign immunity has no place in our jurisprudence, and that it should be replaced by new and rational doctrines which afford government limited immunities. In recent years this Court has seen fit to sweep away the old doctrines of absolute immunity for state officials, *Scheuer v. Rhodes, supra;* municipalities, *Monell v. Department of Social Services,* ..... U. S. ....., 56 L. Ed. 2d 611 (1978); and high federal officials, *Butz v. Economou, supra.* The time has come to consider the doctrine of federal sovereign immunity in the same light.

Conclusion.

It is no understatement to declare that this is both an extraordinary and a tragic case. The wrongs committed by the Government were on a scale and of a nature that defies description. The injuries suffered could not be more severe.

Now, a class of former American servicemen, American citizens, come into an American court seeking justice. They seek to have the Government, the same Government that wronged them, try to save them from the consequences of that wrong. It is the Government, and the Government alone, that has the ability to provide this relief. In the light of the Circuit Court's decision herein this Court, and only this Court, can now provide these servicemen with the relief they so desperately require. It is unthinkable that this Court would deny to these servicemen the opportunity to argue their case.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

STANLEY J. LEVY,
STEVEN J. PHILLIPS,
99 Park Avenue,
New York, N. Y. 10016
Counsel for Petitioners.

KREINDLER & KREINDLER,
New York, New York.

ANDREW R. JACOBS,
LANIGAN O'CONNELL & HIRSH,
Basking Ridge, New Jersey,

Of Counsel.

APPENDIX.

Order of the Honorable Herbert J. Stern Granting in Part Defendant's Motion to Dismiss.

UNITED STATES DISTRICT COURT,

DISTRICT OF NEW JERSEY.

STANLEY JAFFEE and SHARON BLINN JAFFEE, individually,

Plaintiffs,

and

STANLEY JAFFEE, on behalf of all others similarly situated,

Plaintiffs,

against

UNITED STATES OF AMERICA, and Certain Past and Present Officers and Officials of the United States Department of Defense, the Department of the Army and the Atomic Energy Commission and the United States Army whose names will be inserted when ascertained, each individually and in his official capacity,

Defendants.

Civ. 78-1014
Judge Herbert J. Stern

Order.

This matter having come before the Court on the defendant United States of America's Motion to Dismiss pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, and the Court having considered the Motion, defendant's Memorandum of Points and Authorities in

Support Thereof, the Affidavit of Stanley Jaffee, dated June 30, 1978, plaintiffs' Memorandum of Points and Authorities in Opposition, and defendant's Reply Thereto, and after oral argument, the Court concludes: 1) that the doctrine of sovereign immunity deprives this Court of jurisdiction to grant the relief sought in the Fourth, or Class Action Claim; 2) that it is of unusual importance that there be a prompt appellate review of this issue since if plaintiffs' allegations are true, the health and even the lives of a substantial number of former American servicemen may be jeoparized by any delay in affording the relief requested; 3) that there presently exists no claim or counterclaim that would serve as a set off against the relief sought in this claim; and 4) that no future developments on matters presently pending before this Court moot the need for appellate review and 5) that the judgment involves multiple claims and multiple parties.

Accordingly, it is this 27 day of July, 1978, hereby

ORDERED, that defendant's Motion to Dismiss on the grounds that this action is barred by the doctrine of sovereign immunity is hereby granted with respect to plaintiffs' Fourth, or Class Action Claim, only.

AND IT IS FURTHER ORDERED, there being no just cause for delay, that final judgment be, and the same is hereby entered pursuant to Rule 54(b) Federal Rules of Civil Procedure against the plaintiffs, on their Fourth, or Class Action Claim only.

HERBERT J. STERN
United States District Judge

Opinion of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 78-2041

STANLEY JAFFEE and SHARON BLINN JAFFEE, Individually and STANLEY JAFFEE, on behalf of all others similarly situated,

Appellants,

v.

UNITED STATES OF AMERICA, and Certain Past and Present Officers and Officials of the United States Department of Defense, the Department of the Army and the Atomic Energy Commission and the United States Army whose names will be inserted when ascertained, each individually and in his official capacity.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

D.C. Civil No. 78-1014

Argued November 14, 1978

Before ROSENN, GARTH, and HIGGINBOTHAM, *Circuit Judges*

(Opinion filed February 9, 1979)

KREINDLER & KREINDLER
99 Park Avenue
New York, New York 10016

LANIGAN, O'CONNELL & HIRSH
150 North Finley Avenue
Basking Ridge, New Jersey 07920

Of Counsel:

Stanley J. Levy, Esquire
Melvin I. Friedman, Esquire
Steven J. Phillips, Esquire

Attorneys for Appellants

BARBARA ALLEN BABCOCK
Assistant Attorney General
ROBERT L. DEL TUFO
United States Attorney
DAVID J. ANDERSON
REBECCA L. ROSS
ELIZABETH GERE WHITACKER
Attorneys
Civil Division
Department of Justice
Washington, D.C. 20530
Attorneys for Appellee

Opinion of the Court

ROSENN, Circuit Judge

This appeal presents a perplexing problem spawned by modern nuclear warfare which requires us to examine again the doctrine of sovereign immunity of the United States. The genesis of the litigation is the serious injury allegedly incurred by the male plaintiff from atomic radiation while on active duty in the military service.

In 1953, when Stanley Jaffee ("Jaffee") was serving in the United States Army, the Government tested a nuclear device at Camp Desert Rock, Nevada. Jaffee avers that he and other soldiers were ordered to stand in an open field near the site of an explosion of a nuclear bomb without benefit of any prctection against radiation; that the explosion caused Jaffee and other soldiers similarly situated to be exposed to massive doses of highly dangerous radiation; that the Government, knowing of the grave risks of injury from such exposure, nonetheless, deliberately compelled Jaffee and other soldiers similarly assigned to participate in the nuclear testing and in the radiation exposure without their knowledge or consent. Jaffee further alleges that because of his exposure to such radiation, he has developed inoperable cancer.

Asserting that the Government deliberately violated rights guaranteed by the first, fourth, fifth, eighth, and ninth amendments, Jaffee and his wife filed a complaint consisting of four counts in the United States District Court for the District of New Jersey. In Counts I, II, and III, the Jaffees joined the United States and unnamed individuals as defendants and made claims for money damages. Count IV was a class action, in which Stanley Jaffee sought to represent all of the soldiers who were ordered to be present at the explosion. In this count, naming only the United States as a defendant, Jaffee prayed that the United States be directed to warn all members of the class about the medical risks facing them and that the United States be required to provide or subsidize medical care for the members of the class.

The district court dismissed Count IV, concluding that the doctrine of sovereign immunity barred that action against the United States. Under Rule 54(b), Fed. R. Civ. P., the court certified the dismissal for appeal, but retained jurisdiction over Counts I, II, and III. The United States moved this court to dismiss the appeal for lack of jurisdiction or to affirm summarily the order of the district court.

Although we have denied the motion for summary affirmance,[1] the motion to dismiss for lack of appellate jurisdiction is still pending before us, as is Jaffee's appeal from the district court's dismissal of Count IV.

I.

Two possible grounds for jurisdiction have been proposed in this case. First, if the district court properly certified its order under Rule 54(b), Fed. R. Civ. P., we have jurisdiction over a final judgment. 28 U.S.C. §1291 (1976). Second, if the district court entered an interlocutory order denying an injunction, there is appellate jurisdiction under 28 U.S.C. §1292(a)(1) (1976). We begin with section 1292(a)(1).

Under 28 U.S.C. §1292(a)(1), federal appellate courts have jurisdiction over appeals from "[i]nterlocutory orders of the district courts of the United States . . . refusing . . . injunctions . . . ." In Count IV of his complaint, Jaffee moved for an injunction ordering the Government to warn members of the class and to provide medical care for them.[2] The Government contends that this prayer for

[1]On September 15, 1978, Chief Judge Seitz, acting for the court *en banc*, entered an order denying the motion for summary affirmance and referring the motion to dismiss the appeal to the merits panel.

[2]Although Jaffee petitioned for a permanent injunction, this court has held that even granting a permanent injunction is "interlocutory" if other claims are pending before the district court, so that the injunction is not "dispositive of the entire controversy between the parties." *Hook v. Hook & Ackerman, Inc.*, 213 F. 2d 122, 128-29 (3d Cir. 1954). *Hook* concerned the grant of a permanent injunction rather than a denial, but the order denying an injunction in this case comes within the rationale of the case. Because other claims are pending before the district court, the denial of the injunction does not dispose of the entire controversy between the parties. If the denial did end the controversy, we might have jurisdiction under 28 U. S. C. §1291 (1976).

injunctive relief is a disguised claim for damages.

We agree with the Government that the request for prompt medical examinations and all medical care and necessary treatment, in fact, is a claim for money damages. A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money. *See International Engineering Co. Div. of A-T-O, Inc. v. Richardson*, 512 F. 2d 573 (D.C. Cir. 1975), cert. denied, 423 U. S. 1048 (1976); *Warner v. Cox*, 487 F. 2d 1301, 1304 (5th Cir. 1974). Jaffee requests a traditional form of damages in tort—compensation for medical expenses to be incurred in the future. *See, e. g., Coll v. Sherry*, 29 N. J. 166, 148 A. 2d 481, 485 (1959); 25 C.J.S. Damages §91(3) (1966). Indeed, his complaint seeks an injunction ordering either the provision of medical services by the Government or payment for the medical services. The payment of money would fully satisfy Jaffee's "equitable" claim for medical care.

We reach a different result, however, in regard to the petition that the Government warn members of the class about medical risks. The payment of money cannot satisfy this claim. Although providing the warning will impose an expense on the Government, the creation of expense does not necessarily remove a form of relief from the category of equitable remedies. *See, e. g., White v. Mathews*, 559 F. 2d 852, 855-56, 859-60 (2nd Cir. 1977) (writ of mandamus proper remedy by which court orders expedited action by Social Security Administration). Cf. *Edelman v. Jordan*, 415 U. S. 651, 668 (1974) (eleventh amendment bars nominally "equitable" action that "requires payment of state funds, not as a necessary consequence of compliance in the future with a substantive federal-question determination, but as a form of compensation"). The dismissal of the claim for warning is appealable under 28 U.S.C. §1292(a)(1).

Because that part of the district court's interlocutory order dealing with warning to the class was the denial of

an injunction, we have jurisdiction over the whole order, including dismissal of the related claim for medical care. *Kohn v. American Metal Climax, Inc.*, 458 F. 2d 255, 262 (3rd Cir.), cert denied, 409 U. S. 874 (1972). We therefore need not reach the propriety of the district court's certification under Rule 54(b).

II.

The district court ruled that the doctrine of sovereign immunity bars relief under Count IV. We affirm in part and reverse in part.

Jaffee proposes several theories under any one of which he contends his suit against the United States is not foreclosed by the doctrine of sovereign immunity. First, he vigorously argues that courts have the power to abolish the doctrine or create exceptions to it. Second, even if such action is beyond judicial competence, he contends that by enacting and later amending the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.*, Congress has waived sovereign immunity as a defense to his suit.

Jaffee strenuously urges that sovereign immunity is no more than a common law doctrine created by the courts, and as such courts have the power to abolish or modify it. He further asserts that in spite of its longevity, the doctrine is illogical, unjust, outdated, and that it should be stricken in its entirety when it impedes the vindication of what he characterizes as fundamental constitutional rights.

As the plaintiffs observe, the doctrine indeed has a long historical basis, which, although not always regarded with respect, has been traditionally observed in this country, especially as to suits founded in tort.[3] Some have at-

[3]In England where, after centuries of litigation, English subjects had developed, even prior to the American revolution, certain rights to relief against government illegality, they were unable to assert liability against the Crown for the torts of its servants. "The one serious deficiency was the nonliability of government for torts of its servants." L. L. Jaffe, *Suits Against Governments and Officers: Sovereign Immunity* ("Sovereign Immunity"), 77 Harv. L. Rev. 1, 19 (1963).

tributed the doctrine in this country to a vestigial anachronism of the English monarchy when the king could do no wrong. One scholar attributes the prime cause for the early adoption of the doctrine by our new republic to "the powerful resistance of the states to being sued on their debts."[4] Although he offered neither authority nor any reasoned analysis, Chief Justice Marshall concluded in *Cohens v. Virginia*, 6 Wheaton 264, 411-12 (1821), that "[t]he universally accepted opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits." About a quarter of a century later, the Supreme Court had before it a matter in which the United States itself was party defendant. The court held that the suit should be dismissed, reiterating the principle enunciated in *Cohens v. Virginia*.[5]

With the expansion of governmental activities and the multiplication of remediless wrongs caused by its agents, Congress saw fit and just to enact legislation permitting suits against the sovereign on deserving claims growing out of contract, tax collections, and tort. The Federal Tort Claims Act of 1946, 28 U.S.C. §§ 1346, 2671-2680 (1976), is the general tort claims statute providing compensation by the United States for deserving claimants. It is the cul-

[4]*See* L. L. Jaffee, Sovereign Immunity, *supra* 19.

[5]Again without analysis the Court applied the doctrine, merely stating: No maxim is thought to be better established, or even more universally assented to, than that which ordains that a sovereign . . . cannot *ex delicto* be amenable to its own creatures or agents employed under its own authority for the fulfillment merely of its own legitimate ends. A departure from this maxim can be sustained only on the ground of permission on the part of the sovereign or the government expressly declared. . . . *Hill v. United States*, 50 U. S. 386, 389 (1850).

mination of a determined effort to mitigate the unreasonable consequences of sovereign immunity from suit and to relieve Congress from a plague of private bills seeking relief for tortious injuries. The Act confers district court jurisdiction generally over claims for money damages against the United States predicated on negligence. Although the Act has broad coverage, it does contain a number of exceptions. The Supreme Court has carefully considered the specific question of whether that legislation permitted suits against the United States for injuries to a soldier caused by the negligence of his superior officers or the Government. It held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres v. United States,* 340 U. S. 135, 146 (1950).[6]

This is not to say that the Government regards lightly its obligation to those who serve in its armed forces. Congress has enacted a rather comprehensive system of benefits for military personnel and definite and uniform compensation for injuries or death of those in armed services, in addition to medical and hospital treatment. Included are

[6]The Jaffees have not brought any action under the Federal Tort Claims Act. Although the coverage of that Act was extended in 1974, even the expanded law would not aid the Jaffees. The Act now permits suits arising from assault or battery, but only "with regard to acts or omissions of investigative or law enforcement officers of the United States Government. . . ." 28 U. S. C. §2680(h) (1976).

the Military Personnel and Civilian Employees' Claims Act and legislation providing veterans' benefits.[7]

Although the current climate of academic and judicial thought finds government immunity from suit in disfavor, a plausible explanation appears for its continued application to members of the armed forces injured while in the course of active duty, regardless of whether that injury is caused by the negligence of a superior officer or by a direct command. If claims for injuries sustained by members of the armed forces in the execution of military orders were subjected to the scrutiny of courts of justice, then the civil courts would be required to examine and pass upon the propriety of military decisions. The security and common defense of the country would quickly disintegrate under such meddling. "[A]ctions and essential military dis-

[7]Military Personnel and Civilian Employees' Claims Act, 10 U. S. C. §§ 2733, 2735, 2736 (1976), basically permits that claims against the United States for loss of property, personal injury, or death may be settled and paid if the loss or injury was caused by an employee or member of the armed services or was otherwise incident to noncombat activities of the military, but these sections do not grant compensation for personal injury or death of an employee or member of the armed services if the injury or death is incident to his service.

31 U. S. C. §§ 241-43 (1976) permits claims against the United States for damage to the personal property of members of the uniformed services to be settled and paid if the damage was incident to service.

Veterans' Benefits legislation may be found at:

38 U. S. C. §§ 301-62 (1976)—compensation for service-connected liability or death

38 U. S. C. §§ 401-23 (1976)—dependency and indemnity compensation for service-connected deaths

38 U. S. C. §§ 501-62 (1976)—pensions for non-service-connected disability or death or for service

38 U. S. C. §§ 601-54 (1976)—hospital, domiciliary, and medical care

38 U. S. C. §§ 701-88 (1976)—life insurance

cipline would be impaired by subjecting the command to the public criticism and rebuke of any member of the armed forces who chose to bring a suit against the United States." *Jefferson v. United States,* 178 F. 2d 519, 520 (4th Cir. 1949), *aff'd sub nom. Feres v. United States,* 340 U. S. 135 (1950). Even if we were inclined to reconsider the doctrine in connection with an injury sustained as a result of a deliberate military command, we are foreclosed from so doing by the Supreme Court's recent reiteration of the doctrine, although in a different context, in *United States v. Testan,* 424 U. S. 392 (1976).[8]

Alternatively, Jaffee urges that this court can create an exception to the doctrine in order to grant relief for deliberate violation of constitutional rights. For authority supporting this argument, he turns to *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics,* 403 U. S. 388 (1971), and to *Butz v. Economou,* 46 U.S.L.W. 4953 (June 29, 1978). In *Bivens* the Court recognized an implied cause of action for damages against federal officers who had violated the fourth amendment. *Butz* held that certain federal executive officials did not enjoy an absolute immunity for the damage suits permitted by *Bivens.*[9] From these cases Jaffee tries to extract the principle that "the applicable common law doctrine of governmental immunity must yield to the paramount necessity of vindicating constitutional guarantees." But the suits in *Bivens* and *Butz* were against individual federal officers and not against the United States. Because Jaffee has sued the

[8]Even Jaffee's brief concedes that abolition of sovereign immunity is "perhaps beyond the power of this Court."

[9]Other executive officials, exercising adjudicative or prosecutorial functions, were held to be absolutely immune. 46 U.S.L.W. at 4960-63.

Government itself, *Bivens* and *Butz* do not afford him a traversable bridge across the moat of sovereign immunity.[10]

Jaffee would have us make an exception to sovereign immunity because he alleges deliberate violation of his constitutional rights. The repeated statements of the Supreme Court from its inception, however, are plain and unequivocal: the United States is subject to suit only by its consent. As the Court wrote in *United States v. Sherwood,* 312 U. S. 584, 586 (1941), "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of consent to be sued in any court define that court's jurisdiction to entertain the suit." (Citations omitted.) As previously indicated, the Court confirmed this principle in *United States v. Testan,* 424 U. S. 392, 399 (1976): ". . . except as Congress has consented to a cause of action against the United States, 'there is no jurisdiction . . . to entertain suits against the United States.'" (*Quoting United States v. Sherwood,* 312 U. S. 584, 587-88 [1941].) Jaffee correctly points out that neither *Sherwood* nor *Testan* concerned a deliberate constitutional violation. The Court's statements, however, are clear; they leave no basis for the judiciary to carve out the exception which Jaffee seeks. We believe that power lies only with the Congress.

III.

Because of sovereign immunity, Jaffee can sue the United States only if Congress has waived the immunity by statute. *United States v. Testan,* 424 U. S. 392, 399

[10]Jaffee also argues that the principle of sovereign immunity does not preclude a court from fashioning equitable remedies. But unless sovereign immunity has been waived, it bars equitable as well as legal remedies against the United States. *Malone v. Bowdoin,* 369 U. S. 643, 648 (1962) (specific performance barred when sought in "an action which is in sum and substance one against the United States without its consent").

(1976). Jaffee contends that in amending the APA at 5 U. S. C. §702 (1976), the Government has waived immunity to this suit.

After amendment in 1976, 5 U. S. C. §702 now reads, in part:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or *failed to act* in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party . . . Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground. . . . (Emphasis supplied.)

Congress intended that this provision, under some circumstances, would waive sovereign immunity. *See* H. R. Rep. No. 94-1656, 94th Cong., 2d Sess. 1, *reprinted in* [1976] U. S. Code Cong. & Ad. News 6121, 6121.

It may be disputed, however, what those circumstances are. In a recent decision, the Second Circuit has ruled that the amendments to section 702 "did not remove the defense of sovereign immunity in actions under [28 U. S. C.] §1331." *Watson v. Blumenthal,* No. 78-6045 (2d Cir. Oct. 30, 1978) at 115. Jaffee seeks review under section 1331.[11] We are constrained to disagree with the Second Circuit and to hold that section 702, when it applies, waives sovereign immunity in "nonstatutory" review of agency

[11]Jaffee alternatively asserted jurisdiction under 28 U. S. C. §1346(a)(2) (1976). On appeal he evidently has abandoned this jurisdictional theory.

action under section 1331. As the House Report shows, Congress amended section 702 with a specific purpose of waiving sovereign immunity in equitable actions brought under section 1331. The Report notes that acts of the older executive departments, such as the Department of Defense, are subject to judicial review only through "nonstatutory" suits under section 1331.[12] H. R. Rep. No. 94-1656, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U. S. Code Cong. & Ad. News 6121, 6125. Having reviewed the injustices of sovereign immunity in these nonstatutory actions, the Report concludes "that the partial elimination of sovereign immunity, as a barrier to *nonstatutory* review of Federal administrative action" would not unduly interfere with federal agencies. *Id.*, H. R. Rep. at 9, U. S. Code Cong. & Ad. News at 6129 (emphasis supplied). By waiving sovereign immunity in suits for "relief other than money damages," the Congress sought to "facilitate nonstatutory review of Federal administrative action. . . ." *Id.* H. R. Rep. at 19, U. S. Code Cong. & Ad. News at 6140. It was therefore precisely for equitable actions under section 1331 that Congress enacted the amendments to section 702.[13]

[12]These suits are called "nonstatutory" because they are not brought under the statutes that specially provide for review of agency action. *See* H. R. Rep. No. 94-1656, 94th Cong., 2d Sess. 5, *reprinted in* [1976] U. S. Code Cong. & Ad. News 6121, 6125. "In these instances, judicial review is available, if at all, through actions involving matters which arise 'under the Constitution, Laws, or treaties of the United States' as provided in section 1331(a) of title 28." *Id.*

[13]Because the Second Circuit held alternatively in *Watson* that the Tucker Act precluded jurisdiction under section 1331, its observations on 5 U. S. C. §702 were not essential to its decision.

As we concluded in our discussion of appellate jurisdiction, the claim for medical care is an action for money damages. Such an action does not come within the waiver of 5 U.S.C. §702, which covers only suits "seeking relief other than money damages." The claim for medical attention is thus barred by sovereign immunity. The claim for warning, on the other hand, is equitable and is not foreclosed by the limitation of 5 U.S.C. §702 to non-monetary relief.

It might be argued that if a part of Count IV is equitable, the whole count is an action seeking at least some "relief other than money damages." But this reading of the statute would imply a waiver of sovereign immunity in damage suits whenever a plaintiff could append equitable relief to his monetary claims. That result would conflict with the Congressional intent revealed by the House Report on the amendment of 5 U. S. C. §702: "The partial elimination of sovereign immunity will facilitate nonstatutory judicial review . . . without exposing the Government to new liability for money damages. . . ." H. R. Rep. No. 94-1656, 94th Cong., 2d Sess. 19-20, *reprinted in* [1976] U. S. Code Cong. & Ad. News 6121, 6140. The claim for medical care cannot be merged with the waiver in 5 U. S. C. §702.

The statutory waiver of 5 U. S. C. §702 covers "agency action." There are two "agency actions" that Jaffee asks this court to review: first, the alleged order of his commanding officer that Jaffee be present at the atomic explosion; second, the Government's failure, in the years since the explosion, to give medical warning and to provide or subsidize medical care.[14] We are not asked to set aside the order for Jaffee to be present near the blast, nor are

[14]At oral argument, counsel for Jaffee spoke of a "hybrid" composed of the initial order to Jaffee and the Government's subsequent failures to act.

we asked for declaratory relief.[15] As we have already indicated, sovereign immunity precludes the claim for medical care. The only requested relief remaining for our consideration is warning to the class. Therefore, only the second of these "agency actions" is properly before us.[16]

For purposes of this claim, the United States Army is an "agency" within the meaning of the APA. Under 5 U. S. C. §701(b)(1) (1976), "agency" includes "each authority of the Government whether or not it is within or subject to review by another agency. . . ." After setting forth this broad definition, the statute creates several specific exceptions, one of which is for "military authority exercised in the field in time of war or in occupied territory." 5 U. S. C. §701(b)(1)(G) (1976). This exception, however, does not apply in this case. Even if the atomic explosion took place before July 27, 1953, the end of the Korean War, and even if the phrase "in the field in time of war" could be interpreted to cover operations in Nevada, Jaffee's claims concern the Army's failure to act in the years since the explosion and not the order to witness the detonation. This failure to act by the Army was neither in the field nor in time of war. Because the broad definition of "agency" covers "each authority of the Government," and the specific military exception is not applicable, we conclude that the Army acted as an "agency" of the Government for the purposes of this case.

[15]We express no view whether a petition for declaratory relief would be moot.

[16]We need not decide whether military orders given to soldiers by superior officers are committed to agency discretion or otherwise beyond judicial review. *See* 5 U. S. C. §701(a)(2) (1976).

Furthermore, the doctrine of administrative exhaustion has no application to this case. The question of whether Jaffee must present his claim to the appropriate agency is relevant only to determine whether there has been an agency "failure to act" which constitutes "agency action" reviewable under the APA.

When he instituted this suit, Jaffee had not yet requested any agency to warn members of the class about the insidious dangers of exposure to radiation. Even in the absence of any such request or notice to the agency, we do not believe that judicial review is barred under the circumstances of this case. Under the extraordinary facts of this case, in which it is alleged that many soldiers have been exposed to nuclear radiation, each day of delay can reasonably be assumed to bring irreversible and perhaps fatal consequences to them. To postpone judicial review until Jaffee now formally notifies the Army would serve little purpose. We can take judicial notice that the dangers of radiation from nuclear detonation are a matter of public knowledge. Thus, the Army and other relevant agencies have been aware for some time that those servicemen who were obliged to witness the 1953 nuclear detonation were likely to suffer physically from the exposure. Furthermore, even though the Army and other agencies may not have been aware of the hazards of radiation, certainly they have had such knowledge since these proceedings have been initiated, and they also know of the warning relief Jaffee requests. The Army and other defendants, however, have failed to act.

Accordingly, we will reverse the district court's dismissal of Jaffee's claim seeking warning. Insofar as the district court dismissed the claim for medical care, the order of that court will be affirmed. Insofar as the district court dismissed the claim for warning, the order will be reversed and the case remanded for proceedings not inconsistent with this opinion. Costs taxed in favor of appellants.

A True Copy:

Teste:

Clerk of the United States Court of
Appeals for the Third Circuit

Certificate of Service.

STEVEN J. PHILLIPS, an attorney for Petitioner and a member of the Bar of this Court certifies that on March 23, 1979, three copies of the foregoing Petition for a Writ of Certiorari and attached Appendix were served by mail upon all parties required to be served as follows:

Mark Landman
Department of Justice
Washington, D. C. 20530

Donald J. Volkert
United States Attorney for the District of
New Jersey
Federal Building
970 Broad Street
Newark, New Jersey 07120

The Solicitor General of the United States
Department of Justice
Washington, D. C. 20530

Dated: March 23, 1979.

Steven J. Phillips

STEVEN J. PHILLIPS.

No. 78-1478

In the Supreme Court of the United States

OCTOBER TERM, 1978

STANLEY JAFFEE, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners filed this suit and asked the district court to order the United States to give medical examinations and free medical care to all servicemen compelled to be present at a 1953 atmospheric nuclear test at Camp Desert Rock, Nevada. Petitioners allege that the servicemen's presence at the test violated rights guaranteed by the First, Fourth, Fifth, Eighth, and Ninth Amendments to the United States Constitution. The district court dismissed petitioners' claim for medical examinations and medical care on the ground of sovereign immunity (Pet. App. 19-20). On an interlocutory appeal, the court of appeals affirmed (Pet. App. 21-37).[1]

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[1]The court of appeals reversed the district court's decision in one respect. The district court had dismissed petitioners' claim that the government be required to warn those exposed to the 1953 nuclear test of medical risk. The court of appeals held that this claim for prospective equitable relief is not barred by

Petitioners contend (1) that courts of equity have the authority to render "complete justice," including the issuance of orders requiring the government to undertake the expense of medical examinations and care (Pet. 11-12); (2) that the sovereign immunity doctrine does not bar the "vindication of constitutional guarantees" (Pet. 13-14); and (3) that the doctrine "should be abolished outright" (Pet. 14-17). None of petitioners' contentions warrants review.

Sovereign immunity bars judicial relief whenever, as in the present case, a plaintiff seeks relief against the government as compensation for past wrongs. See, *e.g.*, *United States* v. *Testan*, 424 U.S. 392 (1976); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 691 n.11 (1949); cf. *Quern* v. *Jordan*, No. 77-841 (Mar. 5, 1979); *Edelman* v. *Jordan*, 415 U.S. 651 (1974). That principle bars petitioners' claims. They cannot avoid the doctrine by their argument that they merely seek equitable relief (Pet. 11-12). As the court of appeals stated, "[a] plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money" (Pet. App. 25). See *Edelman* v. *Jordan*, *supra*, 415 U.S. at 658. What petitioners request here is a "traditional form of damages in tort—compensation for medical expenses to be incurred in the future" (Pet. App. 25). Petitioners' demand for medical examinations and care at the government's expense must be seen for what it is: a demand for the equivalent of money as

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sovereign immunity and could be pursued in this "extraordinary" case even though petitioners had not presented the claim to the military for agency action. The warning claim is currently pending in the district court. An additional claim for money damages against individual officers who held command positions during the 1953 testing was dismissed by the court and is pending on appeal. (The dismissal was certified as final under Fed. R. Civ. P. 54(b).)

compensation for harms incurred in the past.[2] It is barred by sovereign immunity. No court has accepted petitioners' contrary argument; there is no conflict in decisions requiring resolution here.

There is nothing to petitioners' suggestion that their assertion of constitutional violations abrogates the sovereign immunity doctrine. The source of the injury, or its nature, is irrelevant. Unless Congress has consented to the suit, sovereign immunity is a bar. This Court repeatedly has indicated that damages claims for constitutional violations are barred equally with other damages claims. See, *e.g.*, *Larson* v. *Domestic & Foreign Commerce Corp.*, *supra*, 337 U.S. at 691 n.11; *Duarte* v. *United States*, 532 F. 2d 850 (2d Cir. 1976); cf. *Alabama* v. *Pugh*, No. 77-1107 (July 3, 1978); *Quern* v. *Jordan*, *supra*.

Finally, petitioners ask that the sovereign immunity doctrine be abolished. But this Court has consistently held that the decision to retain or change the doctrine is committed to Congress. See, *e.g.*, *United States* v. *Testan*, *supra*, 424 U.S. at 399; *FHA* v. *Burr*, 309 U.S. 242, 244-245 (1940); *Keifer & Keifer* v. *RFC*, 306 U.S. 381, 389 (1939); *Federal Land Bank of St. Louis* v. *Priddy*, 295 U.S. 229, 231 (1935). That principle controls here.

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[2] A plaintiff could not avoid the doctrine of sovereign immunity by asking for relief in gold and jewels rather than money. Similarly, a form of payment in services readily available in the market for money should be treated as the equivalent of money. The sovereign immunity bar is avoided when, as in *Milliken* v. *Bradley*, 433 U.S. 267, 288-291 (1977), the transfer of money is simply ancillary to a prospective remedy—in that case, eliminating the continuing effects of racial discrimination. But the situation is quite different where, as here, there is a discrete tort (the 1953 test) and a discrete tort remedy (medical care), with the only deviation from the tort model being that the remedy is sought through in-kind services rather than through money.

Congress, of course, has consented to some damages suits against the United States based on the wrongful or negligent conduct of United States employees. See the Federal Tort Claims Act, 28 U.S.C. 1346(b), 2671-2680. Petitioners have eschewed reliance on the Tort Claims Act, however, presumably because in *Feres* v. *United States,* 340 U.S. 135 (1950), this Court held that servicemen injured in the course of their duties are confined to their special military remedies and may not recover under the Tort Claims Act. Congress has left the *Feres* interpretation of the Tort Claims Act undisturbed for almost thirty years. See *Stencel Aero Engineering Corp.* v. *United States,* 431 U.S. 666 (1977). Petitioners should not be permitted to circumvent the *Feres* rule by the expedient of invoking the Constitution in place of the Tort Claims Act.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1979

DOJ-1979-04